RECORD AND BRIEF

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No. _____

IN THE
Supreme Court of the United States

RODNEY CLASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), this Court held that a defendant who pleads guilty can still raise on appeal any constitutional claim that does *not* depend on challenging his "factual guilt." In *Blackledge* and *Menna*, the Court held that double jeopardy and vindictive prosecution are two such claims that are not inherently resolved by pleading guilty, because those claims do not challenge whether the government could properly meet its burden of proving each element of the crime.

In the years since this Court decided *Blackledge* and *Menna*, the circuit courts have deeply divided on whether a defendant's challenge to the constitutionality of his statute of conviction survives a plea, or instead is inherently waived as part of the concession of factual guilt.

The question presented is:

Whether a guilty plea inherently waives a defendant's right to challenge the constitutionality of his statute of conviction?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rodney Class respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The D.C. Circuit's July 5, 2016, opinion (Pet.App.1a) is unpublished. The District Court for the District of Columbia's October 27, 2014, oral order denying Petitioner's motion to dismiss the indictment (Pet.App.6a) is unreported. The district court's April 16, 2014, memorandum order denying in part Petitioner's motion to dismiss the indictment (Pet.App.10a) is reported at 38 F. Supp. 3d 19.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The D.C. Circuit entered its judgment on July 5, 2016.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves U.S. Const., amend. V, and 40 U.S.C. §§ 5101, 5102, 5104, and 5109. These provisions are reproduced in the Constitutional and Statutory Addendum.

INTRODUCTION

The circuit courts are deeply divided on an issue that has a significant impact on the orderly operation of the criminal justice system: whether a defendant, by pleading guilty, inherently waives his right to challenge the constitutionality of his statute of conviction.

In a tandem of cases decided in the 1970s, this Court held that a guilty plea does *not* "inevitably 'waive' all antecedent [*i.e.*, pre-plea] constitutional violations." *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975) (*per curiam*); *accord Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974) (together, "*Blackledge/Menna*"). Rather, a plea inherently concedes only the defendant's "factual guilt," which "renders irrelevant" any claim that depends on challenging the government's evidence of guilt, *Menna*, 423 U.S. at 62 n.2, such as procedural defects or Fourth Amendment violations, *Blackledge*, 417 U.S. at 30.

However, a small set of constitutional claims do not depend on challenging factual guilt. In *Blackledge* and *Menna*, the defendants argued respectively that their prosecutions were barred by double jeopardy and vindictive prosecution, meaning that the government "may not convict [them] no matter how validly [their] factual guilt is established." *Menna*, 423 U.S. at 62 n.2. Such claims would succeed even if the government proffered overwhelming evidence that the defendants had violated the relevant statutes. Accordingly, these claims are not resolved by pleading guilty, and the defendant is therefore not *inherently* foreclosed from raising them on appeal.

In the intervening years, the circuits have sharply divided on how *Blackledge/Menna* applies where a defendant pleads guilty and appeals on the ground that the statute of conviction itself is unconstitutional. *See* Part I, *infra*. Some circuits—including the D.C. Circuit below—hold that a plea inherently waives the right to challenge the constitutionality of the statute of conviction, while other circuits broadly allow such challenges after a plea.

Resolving the split on this issue would make guilty plea proceedings more predictable, thereby benefitting defendants, prosecutors, and courts alike. *See* Part II.A, *infra*. Guilty pleas are a ubiquitous part of the criminal justice system. *See Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). The "horse trading" between prosecutors and defense counsel largely "determines who goes to jail and for how long." *Id.* (quotation marks omitted). During such negotiations, neither the prosecutor nor the defendant benefits from incomplete information regarding what claims could inherently survive a guilty plea. The lack of clarity also negatively affects the courts because district courts risk conducting misleading colloquys. Moreover, the split in the circuit courts means that the scope of review after a guilty plea varies significantly depending solely on where a defendant is indicted and pleads guilty.

Petitioner's case squarely presents the Court with an opportunity to resolve this issue. *See* Part II.B, *infra*. At the district court, Petitioner and the government thoroughly briefed Petitioner's constitutional challenges to his statute of conviction,

none of which concerned Petitioner's factual guilt. Petitioner subsequently pleaded guilty and was sentenced in accordance with his plea. Petitioner then appealed to the D.C. Circuit and re-raised his constitutional claims. The court refused to consider his attacks on the constitutionality of the statute, holding that Petitioner's guilty plea "waive[d]" all "claims of error on appeal, even constitutional claims." Pet.App.3a (quotation marks omitted).

The D.C. Circuit's ruling was directly contrary to this Court's holding in *Menna* that guilty pleas do *not* "inevitably 'waive' all antecedent constitutional violations" and that a defendant can still raise claims that "stand in the way of conviction [even] if factual guilt is validly established." 423 U.S. at 62 n.2. The D.C. Circuit's ruling was also contrary to the rulings of the Third, Fifth, Sixth, Ninth, and Eleventh Circuits, all of which interpret *Blackledge/Menna* to permit constitutional challenges to the validity of a statute following a guilty plea.

The Court should grant the petition, resolve the circuit split, and reverse the D.C. Circuit's improperly narrow interpretation of *Blackledge/Menna*.

STATEMENT OF THE CASE

A. Background Facts.

Petitioner is a retired veteran who resides in North Carolina. Petitioner has a concealed-carry firearm permit from North Carolina. During a May 2013 trip to Washington, D.C., Petitioner left his lawfully-owned

firearms secured out-of-sight in bags inside his locked vehicle, which he parked in a publicly-accessible parking lot on Maryland Avenue, S.W., about 1000 feet away from the foot of the U.S. Capitol Building. *See* J.A.125.[1]

Unbeknownst to Petitioner, the parking lot was considered part of the Capitol Grounds, where all weapons are prohibited pursuant to 40 U.S.C. § 5104(e). No signs indicated that the lot was part of the Capitol Grounds or that weapons were prohibited. J.A.125 n.1. A police officer looked into the cab of Petitioner's vehicle and saw what she mistakenly believed was a gun holster. J.A.125; J.A.162, ¶ 1. When Petitioner returned to his car, he was arrested, and his vehicle was searched. The object the officer saw was not a gun holster, but the search revealed three firearms that Petitioner had stored out-of-sight, as well as several knives. J.A.162, ¶¶ 2, 4.

Petitioner was charged in the U.S. District Court for the District of Columbia with one count of violating 40 U.S.C. § 5104(e).[2]

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[1] Citations to "J.A." refer to the Joint Appendix filed in the D.C. Circuit on November 20, 2015.

[2] Petitioner was also charged with violating D.C. Code § 22-4504(a), but that charge was dropped after § 22-4504(a) was declared unconstitutional. *See Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014).

B. Petitioner Attacks The Constitutionality Of § 5104(e) At The District Court.

Petitioner filed numerous motions to dismiss the indictment, arguing *inter alia* that his storage of lawfully-owned weapons in his locked vehicle was protected by the Second Amendment. *See, e.g.*, J.A.32-33, J.A.36, J.A.43, J.A.46. He also raised a due process notice claim, arguing that he had not been given fair warning that weapons were banned in the parking lot, which was freely accessible by the public. *See* J.A.39.

On April 7, 2014, the district court held a hearing where Petitioner presented arguments on his Second Amendment and due process claims. *See* J.A.65, 69. On April 16, 2014, the court issued an order that addressed Petitioner's arguments. *See* Pet.App.10a-16a; J.A.70-100. The court stated that "to the extent Defendant challenges his prosecution under the Second Amendment of the Constitution, the Government has not submitted a substantive response to this argument. The Court therefore lacks an adequate record on which to evaluate it." Pet.App.16a. The court ordered the government "to file further briefing on this issue." *Id.*

On May 1, 2014, the government filed a brief in response to the district court's order. J.A.101-21. The government extensively addressed the question of whether the Second Amendment, as interpreted by this Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), would prohibit Petitioner's prosecution. J.A.106-13. The government did not provide any

specific evidence or documentation to support its claimed substantial interest in prohibiting all weapons, even when securely stored in cars parked 1000 feet away from the Capitol. Instead, the government argued that all government property is inherently a "sensitive place" where there is no right to armed self-defense. J.A.112.

The government later filed motions that addressed many of the due process/notice arguments that Petitioner had previously raised. The government argued that there could be no notice or warning concerns because: (1) § 5104(e) has no "knowledge and/or intent requirements" (*i.e.*, the statute has "no ... *mens rea* element"), J.A.124, 130; and (2) the statute defining the Capitol Grounds made a "clear reference," J.A.138, to the relevant parking lot when it designated "all grounds bounded by the curblines of First Street, Southwest on the east; Washington Avenue, Southwest to its intersection with Independence Avenue, and Independence Avenue from such intersection to its intersection with Third Street, Southwest on the south; Third Street, Southwest on the west; and Maryland Avenue, Southwest on the north" as being part of the Capitol Grounds. 40 U.S.C. § 5102(c)(1)(C).

On October 27, 2014, the district court orally denied Petitioner's claim that his Second Amendment rights had been violated, concluding that a government-owned parking lot was the same as a "government building[]" where all weapons could presumptively be banned. Pet.App.9a. The court did not address—and therefore

implicitly denied—Petitioner's due process/notice argument.

C. Petitioner Pleads Guilty.

Petitioner's case was set for trial, but he sent a letter to the court indicating that he would be unable to appear. J.A.145. He subsequently pleaded guilty to the one remaining charge of violating § 5104(e).

The plea conceded that Petitioner had violated § 5104, *see* J.A.161, but it did *not* contain any express waiver of the right to appeal Petitioner's conviction, nor did it concede in any way that § 5104 itself was constitutional, *see* J.A.157. The plea also included an integration clause stating that the plea comprised the "[c]omplete [a]greement" between the parties and that no "promises, understandings, or representations have been made ... other than those contained in writing herein." J.A.159.

At the plea colloquy, the district court told Petitioner that he could "appeal a conviction after a guilty plea if [he] believe[d] that [his] guilty plea was somehow unlawful." S.A.102.[3]

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[3] Citations to "S.A." refer to the Supplemental Appendix filed at the D.C. Circuit on February 22, 2016.

D. The D.C. Circuit Holds That A Plea Inherently Waives All Constitutional Claims.

Because the plea lacked any clause waiving his right to appeal his conviction, Petitioner immediately appealed to the D.C. Circuit and filed a *pro se* opening merits brief, focusing on his claim that his Second Amendment rights had been violated. The government did not move to dismiss the appeal as barred by the guilty plea. The D.C. Circuit then appointed counsel to serve as *amicus curiae* to argue in favor of Petitioner.

Amicus fully briefed the primary constitutional challenges that Petitioner had raised at the district court, and Petitioner expressly adopted the *amicus*'s arguments on appeal as his own.[4] Petitioner argued that the Second Amendment protects the right to "keep and bear arms" for self-defense, and that § 5104(e) infringed on that right by effectively banning law-abiding citizens from securely storing lawfully owned weapons in their cars parked in a publicly accessible lot.

Petitioner also argued that § 5104(e), both facially and as-applied, violates the due process clause because it fails to give fair warning as to what areas are considered the Capitol Grounds and thus where weapons are banned. The statutory language defining the relevant portion of the Grounds is exceedingly confusing, making it unclear whether the Grounds

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[4] *See* Pet. Notice Adopting *Amicus* D.C. Cir. Br. (Nov. 30, 2015).

include the parking lot itself, or merely the land adjacent to it. Further, there were no signs in or around the lot that gave any warning that it was part of the Grounds or that weapons were banned. Petitioner argued that the lack of any notice, especially when combined with the government's argument that § 5104(e) had no *mens rea* requirement, violated due process.

In response, the government argued—for the first time, nearly 12 months after Petitioner filed his opening brief—that even though Petitioner's plea did not contain any express waiver of the right to appeal his conviction, the plea *inherently* waived his right to raise any constitutional claims that accrued before he pleaded guilty, including his constitutional challenges to the statute. *See* Gov't D.C. Cir. Br. 28 & n.15.

Petitioner argued in response that his constitutional challenges survived his guilty plea pursuant to this Court's holdings in *Blackledge* and *Menna*. Like the defendants in those cases, Petitioner was not challenging his "factual guilt"—*i.e.*, whether the government could properly satisfy each element of the statute. Rather, Petitioner argued that, even assuming that factual guilt was shown, Petitioner still could not be validly convicted because § 5104 itself was unconstitutional. Petitioner argued that the plea did not address that issue, and therefore the court should reach the merits of his constitutional challenges to the statute.

After oral argument, the D.C. Circuit issued an opinion on July 5, 2016, affirming Petitioner's conviction and refusing to address the merits of any of his claims. Pet.App.1a-5a. The court's holding was based on two premises. *First*, the court cited *Tollett v. Henderson*, 411 U.S. 258, 266-68 (1973), for the "universally-recognized law" that a guilty plea inherently "waive[s] the pleading defendant's claims of error on appeal, even constitutional claims." Pet.App.3a-4a (quotation marks and alteration omitted). The court did not address *Menna*'s rejection of this interpretation of *Tollett*. 423 U.S. at 62 n.2.

Second, the D.C. Circuit cited its own precedent holding that a claim survives under *Blackledge/Menna* only where the constitutional violation is so flagrant that the defendant could not even be "haled into court" to defend himself, Pet.App. 4a (quoting *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004)), even though the defendants in *Blackledge* and *Menna* themselves had to appear in court to answer the charges against them. 417 U.S. at 30; 423 U.S. at 61-62.

REASONS FOR GRANTING THE PETITION

The Court should grant *certiorari* to address the important questions of law presented herein, which have divided the lower courts.

The circuit courts are deeply split on the proper interpretation of this Court's decisions in *Blackledge* and *Menna*. Some circuits, including the D.C. Circuit below, have narrowed *Blackledge* and *Menna* to their facts and held that a plea inherently waives *every* underlying constitutional claim except the double jeopardy and vindictive prosecution claims that were at issue in *Blackledge* and *Menna* themselves. Other circuits, including the Third, Fifth, Sixth, Ninth, and Eleventh Circuits, recognize that *Blackledge* and *Menna* are based on the principle that a guilty plea concedes factual guilt—but does not necessarily concede or waive the constitutionality of the statute of conviction itself. These circuits hold that a plea does not inherently waive the right to raise facial or as-applied challenges to the constitutionality of the statute of conviction. A third group of circuits, including the Fourth, Seventh, and Eighth Circuits, strikes a middle ground, allowing facial—but not as-applied—challenges to survive a guilty plea.

Resolving this split is important for all participants in the criminal justice system because the lack of clarity causes significant unpredictability in guilty plea negotiations and especially the subsequent proceedings, where the circuit courts are often confused about which claims they must address after a plea. This issue is also recurrent. "Criminal justice

today is for the most part a system of pleas, not a system of trials," *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012), as evidenced by the fact that pleas account for 95% of criminal case resolutions in federal court, Lindsey Devers, Bureau of Justice Assistance, U.S. Dep't of Justice, *Plea and Charge Bargaining* 1 (2011), https://www.bja.gov/Publications/PleaBargaining ResearchSummary.pdf. The criminal justice system is essentially a series of plea negotiations—and yet the parties to those negotiations are operating without a clear understanding of the necessary consequences of the plea itself. Whether a defendant can plead guilty and then argue that his or her statute of conviction is unconstitutional depends at the present time simply on the circuit in which the defendant is convicted. Thus, a defendant raising the same claims in the D.C. Circuit would necessarily be subject to a different outcome in the Third, Fifth, Sixth, Ninth, or Eleventh Circuits.

Petitioner's case is an excellent vehicle for resolving this issue. His Second Amendment and due process claims were raised at both the district court and circuit court. Further, his Second Amendment claim was as-applied, while his due process claim was both as-applied and facial. Accordingly, this case presents the Court with the opportunity to address how *Blackledge* and *Menna* apply to both facial and as-applied challenges. Further, Petitioner's guilty plea did not expressly waive his right to appeal his convictions, meaning that his arguments are not independently barred by such a clause.

Finally, the D.C. Circuit's holding below was wrong. The court's ruling that a plea inherently waives any ability to challenge the constitutionality of the statute of conviction is directly contrary to this Court's holding in *Menna* that guilty pleas do *not* "inevitably 'waive' all antecedent constitutional violations." 423 U.S. at 62 n.2. Indeed, the D.C. Circuit's test for which claims survive a plea—*i.e.*, only those claims where the defendant would not even have to come to court to raise them—is so narrow that not even the challenges in *Blackledge* and *Menna* themselves would satisfy it.

The Court should grant the petition.

I. THE CIRCUIT COURTS ARE DEEPLY DIVIDED ON THE QUESTION PRESENTED.

The decision below stated that it was "universally recognized" that a guilty plea inherently waives all "constitutional claims." Pet.App.3a-4a (quotation marks omitted). However, that is far from accurate. The circuit courts are split into three distinct groups on the issue. Three circuits, including the court below, hold that a plea waives every constitutional challenge to the statute of conviction. Five circuits correctly hold that a plea does not waive facial or as-applied challenges to the statute of conviction. And three circuits hold that a plea waives as-applied—but not facial—challenges. This disarray in the circuits means that two defendants raising the same exact constitutional claims in different circuits could have

vastly different outcomes. This Court's intervention is needed to address this situation.

A. Three Circuits Hold That A Guilty Plea Inherently Waives All Constitutional Challenges To The Statute Of Conviction.

The court below, along with the First and Tenth Circuits, has strictly limited *Blackledge* and *Menna* to their facts. These three courts hold that while the specific constitutional claims at issue in *Blackledge* and *Menna*—double jeopardy and vindictive prosecution—can survive a plea, no other claims can survive, including even a facial challenge to the statute.

D.C. Circuit. In its decision below, the D.C. Circuit refused to address Petitioner's Second Amendment and due process challenges to § 5104(e) because "unconditional guilty pleas ... waive the defendant's claims of error on appeal, *even constitutional claims.*" Pet.App.3a (alterations and quotation marks omitted; emphasis added). The court held that the only exceptions to this rule are (1) "the defendant's claimed right not to be haled into court at all," and (2) a claim that "the court below lacked subject matter jurisdiction." Pet.App.4a (quotation marks omitted). The court concluded without analysis that Petitioner's Second Amendment and due process challenges to § 5104(e) did not fit either of these exceptions. *Id.*

The decision below repeatedly cited the D.C. Circuit's prior precedent in *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004), where the

defendants argued that the statute of conviction violated the due process clause. *Id.* at 1343. The court held that the guilty plea in that case inherently waived "a claim that the due process clause limits the substantive reach of the conduct elements" of the statute of conviction. *Id.* (citing *Blackledge* and *Menna*). Thus, the plea waived any claim that the statute's scope was unconstitutional. The court further held that even if the statute was unconstitutional, the defendants would "still need to come to court to answer the charge brought against them," and therefore the claim did not qualify under *Blackledge/Menna*. *Id.* (quotation marks omitted); *accord United States v. Miranda*, 780 F.3d 1185, 1190 (D.C. Cir. 2015) (citing *Blackledge* and *Menna* for proposition that guilty plea inherently waived claim that statute of conviction exceeded Congress's Article I powers).

Accordingly, the D.C. Circuit has effectively narrowed *Blackledge* and *Menna* to their facts: except for double jeopardy and vindictive prosecution, no claims survive a guilty plea.[5]

First Circuit. Relying on D.C. Circuit caselaw, the First Circuit has likewise held that, after a defendant pleads guilty, the court will consider *only* the exact claims from *Blackledge* and *Menna* themselves: a "'due process challenge arising from repetitive, vindictive prosecution' and a double jeopardy challenge." *United*

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[5] That is, aside from the universally-accepted rule that any party can raise a lack of subject matter jurisdiction at any time. Pet.App.4a.

States v. Diaz-Doncel, 811 F.3d 517, 518 n.2 (1st Cir. 2016) (citing *Blackledge* and *Menna*). Aside from those *sui generis* "exception[s]," in the First Circuit, "a guilty plea waives all objections," including a claim that Congress exceeded its authority under Article I to pass the statute of conviction. *Id.*; *accord United States v. Gonzalez*, 311 F.3d 440, 442 (1st Cir. 2002).

Tenth Circuit. The Tenth Circuit has a similarly grudging interpretation of *Blackledge* and *Menna*. In *United States v. De Vaughn*, 694 F.3d 1141 (10th Cir. 2012), the court refused to consider a defendant's claim that the statute to which he had pleaded guilty violated the First Amendment. The court stated that a guilty plea waives all such claims, and "*Blackledge* and *Menna* merely carved out exceptions for two types of constitutional claims"—double jeopardy and vindictive prosecution. *Id.* at 1152. No other claims survive this "narrow exception." *Id.* at 1145, 1152-54.

B. Five Circuits Broadly Allow Post-Plea Challenges To The Constitutionality Of The Statute Of Conviction.

At the opposite end of the spectrum, a group of circuits, including the Third, Fifth, Sixth, Ninth, and Eleventh Circuits, have correctly held that a guilty plea does not inherently waive a defendant's right to challenge his statute of conviction, regardless of whether the challenge is styled as facial or as-applied. Had Petitioner been charged in any of these circuits, the circuit court would have addressed the merits of

both his Second Amendment and his due process claims.

Third Circuit. In *United States v. Whited*, 311 F.3d 259 (3d Cir. 2002), the defendant entered into an unconditional guilty plea and then appealed on the ground that the statute of conviction was "unconstitutional as applied to the facts of her case" because it exceeded Congress's powers under the Commerce Clause. *Id.* at 260. The Third Circuit reached the merits of the claim, finding that it was "properly ... within the narrow scope of review not barred by a guilty plea." *Id.* at 262. Other Third Circuit opinions have held likewise. *See United States v. Bishop*, 66 F.3d 569, 572 n.1 (3d Cir. 1995) (citing *Blackledge* and *Menna*); *United States v. Rodia*, 194 F.3d 465, 469 (3d Cir. 1999).

Fifth Circuit. The Fifth Circuit has relied on *Menna* to broadly hold that "a guilty plea does not waive the right of the defendant to challenge the constitutionality of a statute under which he is convicted." *United States v. Knowles*, 29 F.3d 947, 952 (5th Cir. 1994). While *Knowles* was an as-applied challenge, a prior Fifth Circuit decision strongly suggests that a defendant could widely challenge the constitutionality of a statute because a plea inherently resolves "only ... violations of those *procedural rights* guaranteed by due process which are incident to the criminal investigation and prosecution." *Askew v. Alabama*, 398 F.2d 825, 825 n.1 (5th Cir. 1968) (*per curiam*) (emphasis added).

Sixth Circuit. The Sixth Circuit has also held that "it is well settled that a guilty plea does not waive the right of an accused to challenge the constitutionality of the statute under which he is convicted." *United States v. Skinner*, 25 F.3d 1314, 1316-17 (6th Cir. 1994) (citing *Blackledge*). The Sixth Circuit has applied this rule both to facial challenges, *id.* at 1316, and as-applied challenges, *United States v. Dettra*, 238 F.3d 424, 2000 WL 1872046, at *1, *3 (6th Cir. 2000) (unpublished table decision) (citing *Skinner*, 25 F.3d at 1317).

Ninth Circuit. The Ninth Circuit has also held that a challenge to the validity of a statute outlasts a guilty plea. In *Journigan v. Duffy*, 552 F.2d 283 (9th Cir. 1977), the court held that "[e]ven if the guilty plea establishes as a factual matter that [the defendant] did the acts charged, a successful constitutional attack on the statute violated by those acts would undermine the foundation of the criminal prosecution, making those acts noncriminal." *Id.* at 289 (citing *Blackledge* and *Menna*).

Pursuant to *Journigan*, the court held in *United States v. Sandsness*, 988 F.2d 970 (9th Cir. 1993), that a guilty plea did not bar a defendant's facial or as-applied vagueness challenges on appeal. *Id.* at 971-72.; *accord United States v. Broncheau*, 597 F.2d 1260, 1263 (9th Cir. 1979) (reaching merits of defendant's as-applied vagueness challenges).

Eleventh Circuit. In *United States v. Palacios-Casquete*, 55 F.3d 557 (11th Cir. 1995), the Eleventh Circuit reached the merits of a facial challenge because

a "guilty plea ... does not waive the right of an accused to challenge the constitutionality of the statute under which he is convicted." *Id.* at 561. In *United States v. Saac*, 632 F.3d 1203 (11th Cir. 2011), the court indicated that this rule would apply not just to facial challenges but also to any challenge that could be determined based on "the record at the time of the plea." *Id.* at 1208 (quotation marks omitted).

C. Three Circuits Allow Facial—But Not As-Applied—Challenges To The Statute Of Conviction.

Between these two poles, three circuits have charted a middle course. The Fourth, Seventh, and Eighth Circuits hold that facial—but not as-applied—challenges to a statute can survive a defendant's guilty plea. These circuits draw this distinction despite the notable fact that *Blackledge* and *Menna* themselves were *as-applied* challenges. 417 U.S. at 30; 423 U.S. at 61-62. These courts would refuse to consider Petitioner's as-applied Second Amendment challenge, but they would likely still review Petitioner's due process challenge. *See infra* at 31 n.10 (discussing the numerous flaws in these circuits' facial versus as-applied distinction).

Fourth Circuit. In unpublished decisions, the Fourth Circuit has addressed facial challenges, *see United States v. Aranda*, 612 F. App'x 177, 178 n.1 (4th Cir. 2015) (citing *Menna*), but has refused to address the merits of as-applied claims, finding such claims were waived, *see United States v. Kelly*, 102 F. App'x

838 (4th Cir. 2004) (citing *Menna*). The court has not offered a rationale for the distinction.

Seventh Circuit. The Seventh Circuit likewise addresses facial but not as-applied challenges to a statute post-plea. The court has explained that "[w]hile a facial attack on a statute's constitutionality is jurisdictional, an as-applied vagueness challenge is not." *United States v. Phillips*, 645 F.3d 859, 863 (7th Cir. 2011) (citing *Blackledge* and *Menna*). Accordingly, in the Seventh Circuit, a plea cannot waive a facial challenge.

Eighth Circuit. In *United States v. Seay*, 620 F.3d 919 (8th Cir. 2010), the Eighth Circuit addressed a facial challenge, but held that as-applied challenges are inherently waived by a plea because they are not "jurisdictional in nature." *Id.* at 922-23 (citing *Blackledge* and *Menna*).

* * *

As the deep split in circuit authority shows, the circuit courts lack clarity on the scope of the *Blackledge/Menna* doctrine. In the forty-plus years since *Blackledge* and *Menna* were issued, this Court has addressed the doctrine only once, *see United States v. Broce*, 488 U.S. 563 (1989), in a decision that did not elucidate the rationale or scope of *Blackledge/Menna* but merely re-affirmed that the constitutional determinations must be made using the "existing record" at "the time the plea was entered." *Id.* at 575-76.

It is time for this Court to address the effects of a guilty plea on a defendant's ability to raise constitutional challenges on appeal. All sides to this split have been fully aired in the courts of appeals. Only this Court can resolve the disagreement.[6]

II. THIS CASE IS WORTHY OF THIS COURT'S REVIEW.

A. This Issue Is Recurring And Important.

Resolving this issue is important because the vast majority of federal criminal cases are resolved via guilty plea—yet, because of the lack of clarity in this area, the prosecutor, defendant, and courts lack complete information about what claims will survive the plea.

1. Guilty pleas account for approximately 95% of all resolved federal criminal cases. *See* Devers, *supra*, 1; *Lafler*, 132 S. Ct. at 1388. Given these numbers, it is

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[6] The only circuit with criminal jurisdiction that has not fully weighed in on this issue is the Second Circuit, whose caselaw is unclear. In *United States v. Curcio*, 712 F.2d 1532 (2d Cir. 1983), Judge Friendly's opinion for the court correctly summarized the *Blackledge/Menna* rule: "[A] defendant who has been convicted on a plea of guilty may challenge his conviction on any constitutional ground that, if asserted before trial, would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect." *Id.* at 1539 (quotation marks omitted). However, more recently, the court has suggested without explanation that an unconditional plea waives all constitutional challenges. *See United States v. Lasaga*, 328 F.3d 61, 63 (2d Cir. 2003).

unsurprising that the question presented here arises with frequency in the courts of appeals, as shown by the significant number of cases that have weighed in on the split. *See* Part I, *supra*. But the current state of confusion resulting from *Blackledge* and *Menna* reduces the predictability of plea negotiations and, in particular, the subsequent plea proceedings and appeals. Thus, a ruling clarifying this area of law would greatly benefit defendants, prosecutors, and courts alike.

During guilty plea negotiations, the defendant and the government both benefit from having a complete picture of all relevant facts, including what kinds of claims could survive the plea. "[I]nformed consideration of [significant consequences of a plea] can only benefit both the State and ... defendants during the plea-bargaining process." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). When the parties know all the relevant facts, they can meaningfully and knowingly account for them in their bargaining. Thus, by "bringing [such] consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." *Id.*

But neither side benefits when the law is unclear about the "likely consequences" of a plea. *Brady v. United States*, 397 U.S. 742, 748 (1970). The government can be surprised when a defendant appeals on a claim the government thought had been conceded; and a defendant can be surprised when a court refuses

to consider a claim that he believed was inherently preserved.

The same rule is true for the courts themselves. In the plea colloquoy, the district court must adequately inform the defendant of the rights he is waiving. *See, e.g.*, Fed. R. Crim P. 11. That is difficult where the law is unclear as to what effect the plea itself will have on the defendant's right to raise certain claims on appeal. Circuit courts likewise would benefit from clarity on this issue because they may be improperly foreclosing claims that they have a duty to address, or perhaps are wasting resources by requiring full briefing on the merits of claims that should *not* be heard.

2. The importance of this issue is not diminished by the fact that Rule 11(a)(2) provides a limited mechanism for defendants to preserve certain claims for appeal. *See* Fed. R. Crim P. 11(a)(2). *First*, the procedure in Rule 11(a)(2) is entirely separate from the constitutional rule established in *Blackledge* and *Menna*, a point that the Advisory Committee on Rules made clear: "Subdivision 11(a)(2) ... should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application," because "Subdivision 11(a)(2) has no application to such situations." Fed. R. Crim P. 11 Advisory Committee's Notes to 1983 Amendment (emphasis added). Thus, Rule 11(a)(2) was designed solely to provide a means for preserving claims that challenge factual guilt, which do not inherently survive under *Blackledge/Menna*.

Second, Rule 11(a)(2) requires the prosecutor's permission for the defendant to preserve a claim. *See* Fed. R. Crim. P. 11(a)(2). But a defendant should not have to rely on "the mercy of *noblesse oblige*" just to invoke his pre-existing constitutional rights under *Blackledge* and *Menna*. *United States v. Stevens*, 559 U.S. 460, 480 (2010).

For these reasons, a decision by this Court on the question presented would greatly improve the predictability and fairness of guilty plea negotiations and proceedings.

B. This Case Is An Excellent Vehicle.

This case provides an excellent vehicle to resolve the three-way split in the circuits.

First, Petitioner has raised both as-applied and facial challenges to his statute of conviction. His Second Amendment and due process challenges were extensively briefed at the district court prior to the plea,[7] and then were raised again at the circuit court.[8] In fact, the district court ordered the government to further brief the Second Amendment claim, giving the government a full opportunity to develop the record.

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[7] *See* J.A.32-33, J.A.36, J.A.39, J.A.43, J.A.46, J.A.65, J.A.69, J.A.70-121, J.A.124-40, Pet.App.10a-16a.

[8] *See Amicus* D.C. Cir. Opening Br. 16-56; Gov't D.C. Cir. Br. 33-61; *Amicus* D.C. Cir. Reply Br. 15-29.

Accordingly, this case presents this Court with the opportunity to address how *Blackledge/Menna* applies to both facial and as-applied claims, giving the Court the option of adopting any of the three competing interpretations of *Blackledge/Menna*.

Second, Petitioner's guilty plea does not contain an explicit waiver of his right to appeal his conviction. *See* Pet.App.4a; J.A.157. Thus, there is no obstacle to this Court reaching the question presented here.

Third, a ruling in Petitioner's favor would serve as a bulwark against prosecutorial overreach, without the risk of flooding the circuit courts with frivolous appeals. Pre-plea procedural and evidentiary claims—which amount to the vast majority of constitutional claims that defendants raise pre-trial—would *still* be rendered moot by a plea, just as this Court held in *Blackledge* and *Menna*, because such claims inherently challenge the defendant's factual guilt. *See* 417 U.S. at 30-31.

III. THE D.C. CIRCUIT'S DECISION IS WRONG.

The Court should grant review for the additional reason that the D.C. Circuit's decision below is contrary to this Court's precedent. The D.C. Circuit has effectively limited *Blackledge* and *Menna* to their facts, concluding that a guilty plea waives all pre-plea claims, except for *sui generis* exceptions for claims of double jeopardy and prosecutorial vindictiveness. And the D.C. Circuit's explanation for why those two claims survive is actually inconsistent with *Blackledge* and *Menna* themselves.

1. The court below relied on *Tollett v. Henderson*, 411 U.S. 258, 266-68 (1973), for the proposition that a plea inherently "waives" all "claims of error on appeal, even constitutional claims." Pet.App.3a-4a. However, this Court in *Menna* expressly rejected that interpretation of *Tollett*: "Neither *Tollett* ... nor [the Court's prior guilty plea decisions] stand for the proposition that counseled guilty pleas inevitably 'waive' all antecedent constitutional violations." *Menna*, 423 U.S. at 62 n.2; *see also Blackledge*, 417 U.S. at 29.

Menna recognized that what a plea actually does is establish factual guilt, *i.e.*, it serves as "an admission of all the elements of a formal criminal charge." *McCarthy v. United States*, 394 U.S. 459, 466 (1969). This admission "renders irrelevant" claims that depend on challenging factual guilt—such as evidentiary disputes and procedural errors. *Menna*, 423 U.S. at 63 n.2.

But a plea says nothing about challenges that do *not* depend on disputing the evidence of factual guilt. *Id.* In those cases, the defendant is arguing that "the State may not convict [him] no matter how validly his factual guilt is established." *Id.* Stated another way by Judge Friendly: "a plea of guilty may operate as a forfeiture of all defenses except those that, once raised, cannot be cured" by the government. *United States v. Curcio*, 712 F.2d 1532, 1539 (2d Cir. 1983) (quotation marks omitted).

Viewed through this framework, it is clear that a challenge to the constitutionality of the statute of conviction fits well within the scope of claims that survive under *Blackledge/Menna*. If § 5104(e)—the statute under which Petitioner was convicted—is unconstitutional, then the government "may not convict [Petitioner] no matter how validly his factual guilt is established," *Menna* 423 U.S. at 63 n.2, and the "practical result is to prevent a trial from taking place at all," *Blackledge*, 417 U.S. at 31 (quotation marks omitted). The government could establish conclusive evidence on each element of § 5104(e)—and yet Petitioner would still be entitled to prevail. Or, in the words of Judge Friendly, an unconstitutional statute cannot be "cured" no matter what procedures the government uses. 712 F.3d at 1539.[9]

Indeed, this Court has expressly allowed defendants to challenge the constitutionality of a statute even after pleading guilty. For example, in *Haynes v. United*

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[9] The test for which claims survive under *Blackledge* and *Menna* is very similar to this Court's test for when a habeas claim is based on a substantive rule, as opposed to a procedural rule. In habeas cases, substantive rulings—such as where this Court finds a statute is unconstitutional—apply retroactively. *See Welch v. United States*, 136 S. Ct. 1257, 1264-65 (2016). However, procedural rulings—such as Fourth Amendment decisions—do not apply retroactively. *See id.* *Blackledge* itself relied on this distinction and contrasted a double-jeopardy claim with the "procedural rules that govern the conduct of a trial." 417 U.S. at 31 (quotation marks omitted); *accord Askew*, 398 F.2d at 825 n.1 (guilty plea renders irrelevant only "those *procedural rights* guaranteed by due process which are incident to the criminal investigation and prosecution" (emphasis added)).

States, 390 U.S. 85 (1968), a case that pre-dates *Blackledge/Menna*, this Court held that the defendant's "plea of guilty did not, of course, waive" his claim that the statute of conviction "violated his privilege against self-incrimination." *Id.* at 86, 87 n.2; *see also Halbert v. Michigan*, 545 U.S. 605, 621-22 (2005) (holding that "[o]ne who pleads guilty or *nolo contendere* may still raise on appeal '*constitutional defects that are irrelevant to his factual guilt*, double jeopardy claims requiring no further factual record, [and] jurisdictional defects'" (emphasis added)).

2. The D.C. Circuit's misunderstanding of *Blackledge/Menna* is confirmed by the illogical test that the court uses for determining which claims would actually survive a plea. The D.C. Circuit has held that the *Blackledge/Menna* doctrine applies only where the constitutional claim is so manifest that the defendant would not even have "to come to court to answer the charge brought against [him]." *Delgado-Garcia*, 374 F.3d at 1343 (quotation marks omitted); *accord* Pet.App.4a.

That test cannot be correct, however, because in *Blackledge* and *Menna* themselves, the defendants still had to appear in court, answer the charge, and proffer evidence showing that the prosecution was barred by double jeopardy or vindictive prosecution. 417 U.S. at 24-25; 423 U.S. at 61. It is difficult to imagine what claim could ever survive the D.C. Circuit's test, given that every defendant must "come into court to answer the charge brought." Petitioner is aware of no authority allowing a district court to *sua sponte* dismiss

a criminal indictment on constitutional grounds, without the defendant even appearing or raising an argument.

To avoid contradicting the outcomes in *Blackledge* and *Menna* themselves, the D.C. Circuit has held that double jeopardy and vindictive prosecution claims are *sui generis* because in those cases "the very act of haling the defendant[] into court completed the constitutional violation." *Miranda*, 780 F.3d at 1190. However, that is simply incorrect. Double Jeopardy is not triggered until the jury is actually empaneled, meaning that the "very act of haling" the defendant into court does *not* "complete[] the constitutional violation" of double jeopardy. *See, e.g., Crist v. Bretz*, 437 U.S. 28, 38 (1978). This Court has likewise indicated that even a successful claim of vindictive prosecution does not mean the defendant has no obligation to appear in court, but rather that he has a right to "a new trial free of the taint of vindictiveness." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 267-68 (1982) (citing *Blackledge*, 417 U.S. at 30).

In other words, just like Petitioner, a defendant alleging double jeopardy or vindictive prosecution still must "come to court to answer the charge brought against [him]." *Delgado-Garcia*, 374 F.3d at 1343 (quotation marks omitted).

3. The practical result of the D.C. Circuit's jurisprudence is that *Blackledge* and *Menna* have been strictly narrowed to their facts, with no possibility of other constitutional claims surviving a plea.

This Court should grant the petition and hold that *Blackledge* and *Menna* did not announce a *sui generis* rule lacking any underlying principle. Rather, the rationale of those cases extends directly to claims that the statute of conviction is unconstitutional, whether framed as a facial or an as-applied challenge. Accordingly, the D.C. Circuit erred by refusing to consider the merits of Petitioner's constitutional claims.[10]

* * *

This case directly presents a recurring issue on which the circuit courts are deeply split and which is of

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[10] Likewise erroneous are the circuits that allow facial—but not as-applied—challenges to survive. *See* Part I.C, *infra*. That distinction makes little sense given that *Blackledge* and *Menna* themselves involved as-applied challenges. 417 U.S. at 30; 423 U.S. at 61-62. Also, this Court stated in *Broce* that a *Blackledge/Menna* claim could be based on *either* the face of the indictment *or* the "existing record" at *"the time the plea was entered,"* indicating that the circuit court must consider the particular facts proffered at the district court. *Broce*, 488 U.S. at 575 (emphasis added). Further, this Court has made clear that the "distinction between facial and as-applied challenges is not so well defined that it has some automatic effect." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). Finally, such a rule would encourage defendants to needlessly raise facial challenges rather than narrower as-applied ones, in direct contravention of this Court's dictate that facial challenges "run contrary to the fundamental principle of judicial restraint" because they ask the court to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (quotation marks omitted).

significant importance to the orderly and predictable operation of the federal criminal justice system. The Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
APPELLEE

v. No. 15-3015

RODNEY CLASS,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:13-cr-00253-1)

Before: GRIFFITH and SRINIVASAN, Circuit Judges, and SENTELLE, Senior Circuit Judge.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs of the parties and oral arguments of counsel. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). For the reasons stated below, it is

ORDERED and ADJUDGED that the judgment of the district court be affirmed.

Appellant Rodney Class pleaded guilty in the district court to possession of a firearm on Capitol grounds in violation of 40 U.S.C. § 5104(e). Although the defendant appeared pro se at the time of the plea, he had previously been represented by appointed counsel and counsel had been discharged at his request, although the Federal Public Defender served as stand-by or advisory counsel. Despite his sometime lack of counsel, the plea followed extended motions practice and was memorialized in a plea agreement.

The district court conducted a full inquiry pursuant to Federal Rule of Criminal Procedure 11. That inquiry included the following exchange:

THE COURT: If you went to trial and you were convicted, you would have a right to appeal your conviction to the Court of Appeals and to have a lawyer help you prepare your appeal. Do you understand that?

[APPELLANT]: Yes.

THE COURT: Do you know what I mean by your right to appeal?

[APPELLANT]: Yeah. Take it to the next court up.

THE COURT: All right.

Now, by pleading guilty, you would be generally giving up your rights to appeal. Do you understand that?

[APPELLANT]: Yes.

THE COURT: Now, there are exceptions to that.

You can appeal a conviction after a guilty plea if you believe that your guilty plea was somehow unlawful or involuntary or if there is some other fundamental defect in these guilty-plea proceedings.

You may also have a right to appeal your sentence if you think the sentence is illegal. Do you understand those things?

[APPELLANT]: Yeah. Pretty much.

THE COURT: Now, if you plead guilty in this case and I accept your guilty plea, you'll give up all of the rights I just explained to you, aside from the exceptions that I mentioned, because there will not be any trial, and there will probably be no appeal. Do you understand that?

[APPELLANT]: Yes.

Tr. of Plea Hearing at 16:2-17:4, *United States v. Class*, No. 13-253-RWR-1 (D.D.C. Nov. 21, 2014).

On appeal, Class attempts to assert three grounds of constitutional error and a further claim of statutory error. None of them are properly before us.

It is well-established law that "[u]nconditional guilty pleas that are knowing and intelligent . . . waive the pleading defendant['s] claims of error on appeal, even constitutional claims." *United States v. Delgado-Garcia*, 374 F.3d 1337, 1341 (D.C. Cir. 2004). Although the Federal Rules of Criminal Procedure provide for

conditional pleas wherein a pleading defendant may "reserv[e] in writing the right to have an appellate court review an adverse determination of a specified pretrial motion," Fed. R. Crim. P. 11(a)(2), the defendant's plea in the present case contains no such reservation.

The plea agreement included an explicit waiver of appeal rights as to sentencing errors and collateral attacks on the conviction, but not as to alleged errors in the indictment or in proceedings before the sentencing. Appellant apparently believes that the lack of an explicit waiver permits him to proceed in the present appeal. He is in error. The holding from *Delgado-Garcia* quoted above reflects the universally-recognized law of the United States. *See, e.g., Tollett v. Henderson*, 411 U.S. 258, 266-68 (1973).

There are two recognized exceptions to this rule: "the defendant's claimed right not to be haled into court at all," and a claim "that the court below lacked subject-matter jurisdiction over the case . . . ." *Delgado-Garcia*, 374 F.3d at 1341 (citations and internal quotation marks omitted). Neither claimed exception applies here. We therefore affirm the judgment of the district court.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CR No. 13-253-RWR-1
	)	
vs.	)	Washington, D.C.
	)	October 27, 2014
RODNEY CLASS,	)	10:00 a.m.
	)	
Defendant.	)	
	)	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE RICHARD W. ROBERTS

APPEARANCES:

For the Government:

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* * * * *

Mr. Class moves to dismiss the criminal case against him and alleges that the charges against him are invalid under the Second Amendment to the United States Constitution. And he seeks the removal of his GPS tracking device.

His second motion docketed as No. 35, challenging the charges against him under the Second Amendment, is captioned as "Judicial Notice Motion To Remove U.S. Code 28, Section 2672 Administrative Adjustment of Claims."

I will construe his pro se motions liberally, as I must, and will treat them as a challenge to the remaining federal count, since the D.C. Code charge is no longer in the case.

Mr. Class contends, in essence, that the holdings in three cases: *District of Columbia versus Heller*, reported at 554—I'm sorry, 554 U.S. 570 in 2008, and *McDonald versus Chicago*, reported at 561 U.S. 742 in 2010, and *Parker versus District of Columbia*, reported at 478 F.3d 370 by the D.C. Circuit in 2006, all require that the charge against him be dismissed.

The Second Amendment to the U.S. Constitution provides that a well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

In the *Heller* case, the Supreme Court held that the D.C. gun statute restrictions violated an individual's Second Amendment right to keep and bear arms.

Although the Supreme Court held the D.C. gun law unconstitutional, that court was careful in emphasizing that nothing in our opinion should be taken to cast doubt on longstanding laws forbidding the carrying of firearms in sensitive places such as schools and government buildings. Importantly, the Court stressed that such laws are presumptively lawful, regulatory measures.

In *Heller*, too, decided by the D.C. Circuit in 2011 and reported at 670 F.3d 1244, the D.C. Circuit adopted a two-part test to assist courts in deciding the Second Amendment challenges to gun control statues.

Under the two-step test, a reviewing court will be required to ask first whether a particular provision impinged upon a right protected by the Second Amendment. And if it does, then the Court has to determine whether the provision passes muster under the appropriate level of constitutional scrutiny.

A longstanding statutory restriction is presumed to be lawful or presumed not to burden conduct within the scope of the Second Amendment. A plaintiff can rebut this presumption by showing the regulation does not have more than a de minimis effect on his right.

To determine whether the particular gun control law may be upheld, the D.C. Circuit concluded that intermediate scrutiny was the appropriate level of scrutiny. To pass muster under intermediate scrutiny, the government has to show that the restrictions are substantially related to an important governmental objective. Now, under this showing, the government would be required to establish a tight fit between the restrictions and an important or substantial

governmental interest, a fit that employs not necessarily the least restrictive means, but a means narrowly tailored to achieve the desired objective.

Because the Supreme Court determined, in *Heller*, that laws prohibiting individuals from carrying firearms in sensitive places, such as government buildings, are presumptively lawful, regulatory measures, Mr. Class would have to rebut this presumption by showing that there was more than a de minimis effect on his exercise of his Second Amendment right. But he has not provided any evidence to rebut the presumption that Section 5104(e)(1) does not burden conduct protected by the Second Amendment.

From as best I can decipher from what he files in his motions, he asserts only that the District of Columbia city code, quote/unquote, "is unconstitutional," and then he cites to those three cases: Heller, McDonald and Parker.

Although his motions have been construed generously, he would have to provide more than bold assertions to support his Second Amendment claim against the federal statute. And so his motions, that's Nos. 20 and 35, challenging the charge against him on Second Amendment grounds, are denied.

* * * * *

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Crim. Action
	)	No. 13-253 (GK)
RODNEY CLASS,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION AND ORDER

Pending before the Court are thirty-six Motions filed by Defendant Rodney Class [Dkt. Nos. 7, 10-14, 16, 20-22, 23, 25-49]. Upon consideration of the Motions, the Government's three Omnibus Responses, the arguments presented at the Motions Hearing on April 7, 2014, and the entire record herein, and for the reasons set forth below, Defendant's Motions are **granted in part, denied in part**, and, pending further development of the record, **deferred in part**.

I. BACKGROUND

On May 30, 2013, Defendant was arrested by United States Capitol Police for possession of three firearms on United States Capitol Grounds. *See* Indictment [Dkt. No. 1].[1]

On September 3, 2013, a grand jury in the United States District Court for the District of Columbia indicted Defendant on two charges: (1) possession of three firearms on United States Capitol Grounds in violation of 40 U.S.C. § 5104(e)(1); and (2) carrying a concealed pistol outside of his home or business place in violation of D.C. Code § 22-4504(a).[2] On September 5, 2013, Defendant appeared before Magistrate Judge John Facciola for arraignment. The Federal Defender for the District of Columbia was appointed to represent him and he was released on his own recognizance and placed in the Court's High Intensity Supervision Program.[3]

Subsequently, Defendant indicated through written filings and oral requests at several court appearances that he wished to represent himself. On March 26, 2014,

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[1] Defendant is alleged to have possessed a Taurus .44 caliber pistol, a Ruger LC9 9 mm pistol, and a Henry Arms .44 caliber rifle. *See* Indictment [Dkt. No. 1].

[2] On May 31, 2013, prior to the grand jury's indictment in this Court, Defendant was charged in the Superior Court for the District of Columbia with Carrying a Pistol in violation of D.C. Code § 22-4504(a). The case in Superior Court was eventually dismissed, but the record does not indicate when.

[3] On January 17, 2014, the case was reassigned to this Court after Judge Robert Wilkins, the District Judge previously assigned to the case, was elevated to the Court of Appeals for the D.C. Circuit.

the Court held a status conference at which it advised Defendant in great detail of the risks of self-representation in order to ensure that, in the event he ultimately elected to waive his constitutional right to appointed counsel, such election would be "knowing, intelligent, and voluntary." *United States v. Cunningham*, 145 F.3d 1385, 1391 (D.C. Cir. 1998). The Court then asked Defendant to further consider whether he wished to represent himself in light of the risks identified by the Court, and to inform the Court of his final decision at his next court appearance.

Meanwhile, between January 3, 2014, and March 27, 2014, Defendant, although still represented by counsel, filed thirty-six *pro se* Motions. [Dkt. Nos. 7, 10-14, 16, 20-22, 23, 25-49].[4] After he filed the first six of these Motions, the Court advised the Government at a status conference on February 3, 2014, that it could respond to the then-pending Motions with a single omnibus response indicating merely whether it opposed or did not oppose the requested relief. On February 7, 2014, the Government filed an Omnibus Response to the first six of these Motions ("Gov't's First Omnibus Resp.") [Dkt. No. 17]. On March 7, 2014, after Defendant filed additional Motions, the Government filed a second Omnibus Response to four more of his Motions ("Gov't's

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[4] Subsequently, Defendant submitted four additional Motions that were entirely repetitious of his other Motions. Because all of these Motions were submitted *pro se*, Defendant was required to obtain the Court's permission before they could be filed on the docket. The Court granted permission to file Defendant's first thirty-six Motions, but denied him permission to file the four additional Motions that were duplicative of the first thirty-six.

Second Omnibus Resp.") [Dkt. No. 24]. On April 4, the Government filed a third Omnibus Response to the remainder of Defendant's Motions ("Gov't's Third Omnibus Resp.") [Dkt. No. 51].

Defendant did not file any formal Replies in further support of his Motions, despite being advised by the Court at a status conference on February 27, 2014, that he had a right to do so. He did, however, file various submissions styled as "objections" to the Government's Omnibus Responses. These submissions address the Government's various Omnibus Responses but also raise new arguments and requests for relief. *See* Dkt. Nos. 28, 32, 36. As a result, the Court shall treat them as independent "Motions," but shall also consider them in further support of each of Class's other Motions.

On April 7, 2014, the Court held a Motions Hearing at which Defendant presented argument on his Motions. He also informed the Court at that time that, having considered the risks of self representation, he still desired to waive his right to appointed counsel and proceed *pro se*. The Court accepted Defendant's waiver as knowing and voluntary, granted his request to proceed *pro se*, and appointed the Federal Defender, A.J. Kramer, as stand-by advisory counsel. The Government elected not to present any substantive argument on Defendant's Motions but requested the opportunity to submit additional briefing in the event the Court was inclined to grant any of the Motions.

At the conclusion of the Motions Hearing, in light of the voluminous submissions Defendant had already filed, the Court issued an Order requiring Defendant to seek express permission from the Court prior to filing

any additional Motions. *See* Order dated April 7, 2014 [Dkt. No. 52].

II. DISCUSSION

The Court construes Defendant's Motions liberally for any possible relief to which he might be entitled. *See, e.g., Toolasprashad v. Bureau of Prisons*, 286 F.3d 576, 583 (D.C. Cir. 2002) (court has an "obligation to construe pro se filings liberally"). It observes, however, that although Defendant raises a few issues that bear further consideration, a number of his Motions are duplicative of each other, and many are, to a large extent, utterly incomprehensible. Furthermore, most of the Motions purport to cite legal principles that either do not exist or are provisions of civil law wholly inapplicable to the issues in this criminal case. With this background in mind, the Court addresses each Motion as follows.[5]

* * * * *

8. **Requirement for Judicial Notice: Motion and Requirement to Quash Plaintiff's Latest Response and a Requirement to Dismiss All Charges for Lack of Direct Rebuttal of Court Ordered Subject Matter, Lack of Standing, Frivolous Filings, and Failure to Produce a *Corpus Delicti* [Dkt. No. 20] ("Motion #8")**

In this Motion, Defendant seeks to quash the Government's First Omnibus Response on the basis that

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[5] In listing Defendant's Motions, the Court retains the exact spelling and capitalization used by Defendant.

he does not deem it responsive to his Motions. At the status conference on February 3, 2014, the Court expressly advised the Government that it could respond to Defendant's numerous Motions in summary fashion, and therefore, the summary nature of Defendant's First Omnibus Response is not a basis to "quash" the Response. As discussed in more detail below, however, the Government shall be directed to submit further briefing on certain issues raised by Defendant's Motions.

To the extent Defendant challenges the Government's "standing" to bring this case, the United States Attorney's Office for the District of Columbia has the authority to prosecute crimes against the United States and the District of Columbia. *See* Fed. R. Crim. P. 1(b)(1)(B).

To the extent Defendant challenges the prosecutor's competence and alleges malicious prosecution, he provides absolutely no support for these allegations.

To the extent Defendant argues that the criminal provisions under which he is charged, 40 U.S.C. § 5104(e) and 22 D.C. Code § 4504(a), apply only to business entities, government instrumentalities and other corporate "persons," but not to natural persons such as himself, this argument is contradicted by the plain language of the laws under which he is charged. Only natural persons are capable of "carry[ing]" a firearm in the manner prohibited. *See* 40 U.S.C. § 5104(e) ("An individual or group of individuals . . . *may not carry* on or have readily accessible to any individual on the Grounds or in any of the Capitol Buildings a firearm [or] a dangerous weapon[.]") (emphasis added); 22 D.C. Code § 4504(a) ("No person *shall carry* within the District of

Columbia either openly or concealed on or about their person, a pistol or any deadly or dangerous weapon[.]") (emphasis added). Moreover, Section 5104(e) explicitly refers to an "individual or group of individuals," thereby making clear that its prohibitions apply to a natural person such as Defendant, and not a corporate person.[6]

* * * * *

Finally, to the extent Defendant challenges his prosecution under the Second Amendment of the Constitution, the Government has not submitted a substantive response to this argument. The Court therefore lacks an adequate record on which to evaluate it. The Government shall be ordered to file further briefing on this issue no later than **May 1, 2014**, and the Defendant may, but is not required to, file a further Response within **14 days** of the Government's submission.

For the foregoing reasons, Defendant's Motion shall be **deferred** insofar as it relates to the Second Amendment and otherwise shall be **denied**.

* * * * *

/s/ Gladys Kessler

April 16, 2014 United States District Judge

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[6] As support for his argument that the criminal provisions at issue do not apply to natural persons, Defendant relies on portions of the United States Tax Code, the Texas Administrative Code and Delaware Administrative Code, all of which are inapplicable to this criminal case.

Appendix D

Constitutional and Statutory Provisions Involved

U.S. Const. amend. V:

No person shall be ... deprived of life, liberty, or property, without due process of law ...

40 U.S.C.A. § 5101

In this chapter, the term "Capitol Buildings" means the United States Capitol, the Senate and House Office Buildings and garages, the Capitol Power Plant, all buildings on the real property described under section 5102(c) (including the Administrative Building of the United States Botanic Garden) all buildings on the real property described under section 5102(d), all subways and enclosed passages connecting two or more of those structures, and the real property underlying and enclosed by any of those structures.

40 U.S.C. § 5102

(a) Legal description.--The United States Capitol Grounds comprises all squares, reservations, streets, roadways, walks, and other areas as defined on a map entitled "Map showing areas comprising United States Capitol Grounds", dated June 25, 1946, approved by the Architect of the Capitol, and recorded in the Office of the Surveyor of the District of Columbia in book 127, page 8, including all additions added by law after June 25, 1946.

(b) Jurisdiction.--

(1) Architect of the Capitol.--The jurisdiction and control over the Grounds, vested prior to July 31, 1946, by law in the Architect, is extended to the entire area of the Grounds. Except as provided in paragraph (2), the Architect is responsible for the maintenance and improvement of the Grounds, including those streets and roadways in the Grounds as shown on the map referred to in subsection (a) as being under the jurisdiction and control of the Commissioners of the District of Columbia.

(2) Mayor of the District of Columbia.--

(A) In general.--The Mayor of the District of Columbia is responsible for the maintenance and improvement of those portions of the following streets which are situated between the curblines of those streets: Constitution Avenue from Second Street Northeast to Third Street Northwest, First Street from D Street Northeast to D Street Southeast, D Street from First Street Southeast to Washington Avenue Southwest, and First Street from the north side of Louisiana Avenue to the intersection of C Street and Washington Avenue Southwest, Pennsylvania Avenue Northwest from First Street Northwest to Third Street Northwest, Maryland Avenue Southwest from First Street Southwest to Third Street Southwest, Second Street Northeast from F Street Northeast to C Street Southeast; C Street Southeast from Second Street Southeast to First Street Southeast; that portion of Maryland Avenue Northeast from Second Street Northeast to First Street Northeast; that portion

of New Jersey Avenue Northwest from D Street Northwest to Louisiana Avenue; that portion of Second Street Southwest from the north curb of D Street to the south curb of Virginia Avenue Southwest; that portion of Virginia Avenue Southwest from the east curb of Second Street Southwest to the west curb of Third Street Southwest; that portion of Third Street Southwest from the south curb of Virginia Avenue Southwest to the north curb of D Street Southwest; that portion of D Street Southwest from the west curb of Third Street Southwest to the east curb of Second Street Southwest; that portion of Washington Avenue Southwest, including sidewalks and traffic islands, from the south curb of Independence Avenue Southwest to the west curb of South Capitol Street.

(B) Repair and maintenance of utility services.--The Mayor may enter any part of the Grounds to repair or maintain or, subject to the approval of the Architect, construct or alter, any utility service of the District of Columbia Government.

(c) National Garden of the United States Botanic Garden.--

(1) In general.--Except as provided under paragraph (2), the United States Capitol Grounds shall include--

(A) the National Garden of the United States Botanic Garden;

(B) all grounds contiguous to the Administrative Building of the United States Botanic Garden, including Bartholdi Park; and

(C) all grounds bounded by the curblines of First Street, Southwest on the east; Washington Avenue, Southwest to its intersection with Independence Avenue, and Independence Avenue from such intersection to its intersection with Third Street, Southwest on the south; Third Street, Southwest on the west; and Maryland Avenue, Southwest on the north.

(2) Maintenance and improvements.– Notwithstanding subsections (a) and (b), jurisdiction and control over the buildings on the grounds described in paragraph (1) shall be retained by the Joint Committee on the Library, and the Joint Committee on the Library shall continue to be solely responsible for the maintenance and improvement of the grounds described in such paragraph.

(3) Authority not limited.--Nothing in this subsection shall limit the authority of the Architect of the Capitol under section 307E of the Legislative Branch Appropriations Act, 1989 (40 U.S.C. 216c).

(d) Library of Congress buildings and grounds.–

(1) In general.–Except as provided under paragraph (2), the United States Capitol Grounds shall include the Library of Congress grounds described under section 11 of the Act entitled "An Act relating to the policing of the buildings of the Library of Congress", approved August 4, 1950 (2 U.S.C. 167j).

(2) Authority of Librarian of Congress.--Notwithstanding subsections (a) and (b), the Librarian of Congress shall retain authority over the Library of Congress buildings and grounds in accordance with section 1 of the Act of June 29, 1922 (2 U.S.C. 141; 42 Stat. 715).

40 U.S.C. § 5104

(a) Definitions.--In this section--

(1) Act of physical violence.--The term "act of physical violence" means any act involving--

(A) an assault or other infliction or threat of infliction of death or bodily harm on an individual; or

(B) damage to, or destruction of, real or personal property.

(2) Dangerous weapon.--The term "dangerous weapon" includes--

(A) all articles enumerated in section 14(a) of the Act of July 8, 1932 (ch. 465, 47 Stat. 654); and

(B) a device designed to expel or hurl a projectile capable of causing injury to individuals or property, a dagger, a dirk, a stiletto, and a knife having a blade over three inches in length.

(3) Explosives.--The term "explosives" has the meaning given that term in section 841(d) of title 18.

(4) Firearm.--The term "firearm" has the meaning given that term in section 921(3) of title 18.

(b) Obstruction of roads.--A person may not occupy the roads in the United States Capitol Grounds in a manner that obstructs or hinders their proper use, or use the roads in the area of the Grounds, south of Constitution Avenue and B Street and north of Independence Avenue and B Street, to convey goods or merchandise, except to or from the United States Capitol on Federal Government service.

(c) Sale of articles, display of signs, and solicitations.--A person may not carry out any of the following activities in the Grounds:

(1) offer or expose any article for sale.

(2) display a sign, placard, or other form of advertisement.

(3) solicit fares, alms, subscriptions, or contributions.

(d) Injuries to property.--A person may not step or climb on, remove, or in any way injure any statue, seat, wall, fountain, or other erection or architectural feature, or any tree, shrub, plant, or turf, in the Grounds.

(e) Capitol Grounds and Buildings security.--

(1) Firearms, dangerous weapons, explosives, or incendiary devices.--An individual or group of individuals--

(A) except as authorized by regulations prescribed by the Capitol Police Board--

(i) may not carry on or have readily accessible to any individual on the Grounds or in any of the Capitol Buildings a firearm, a dangerous weapon, explosives, or an incendiary device;

(ii) may not discharge a firearm or explosives, use a dangerous weapon, or ignite an incendiary device, on the Grounds or in any of the Capitol Buildings; or

(iii) may not transport on the Grounds or in any of the Capitol Buildings explosives or an incendiary device; or

(B) may not knowingly, with force and violence, enter or remain on the floor of either House of Congress.

(2) Violent entry and disorderly conduct.--An individual or group of individuals may not willfully and knowingly--

(A) enter or remain on the floor of either House of Congress or in any cloakroom or lobby adjacent to that floor, in the Rayburn Room of the House of Representatives, or in the Marble Room of the Senate, unless authorized to do so pursuant to rules adopted, or an authorization given, by that House;

(B) enter or remain in the gallery of either House of Congress in violation of rules governing admission to the gallery adopted by that House or pursuant to an authorization given by that House;

(C) with the intent to disrupt the orderly conduct of official business, enter or remain in a room in any of the Capitol Buildings set aside or designated for the use of--

(i) either House of Congress or a Member, committee, officer, or employee of Congress, or either House of Congress; or

(ii) the Library of Congress;

(D) utter loud, threatening, or abusive language, or engage in disorderly or disruptive conduct, at any place in the Grounds or in any of the Capitol Buildings with the intent to impede, disrupt, or disturb the orderly conduct of a session of Congress or either House of Congress, or the orderly conduct in that building of a hearing before, or any deliberations of, a committee of Congress or either House of Congress;

(E) obstruct, or impede passage through or within, the Grounds or any of the Capitol Buildings;

(F) engage in an act of physical violence in the Grounds or any of the Capitol Buildings; or

(G) parade, demonstrate, or picket in any of the Capitol Buildings.

(3) Exemption of government officials.--This subsection does not prohibit any act performed in the lawful discharge of official duties by--

(A) a Member of Congress;

(B) an employee of a Member of Congress;

(C) an officer or employee of Congress or a committee of Congress; or

(D) an officer or employee of either House of Congress or a committee of that House.

(f) Parades, assemblages, and display of flags.--Except as provided in section 5106 of this title, a person may not-

(1) parade, stand, or move in processions or assemblages in the Grounds; or

(2) display in the Grounds a flag, banner, or device designed or adapted to bring into public notice a party, organization, or movement.

40 U.S.C. § 5109

(a) Firearms, dangerous weapons, explosives, or incendiary device offenses.--An individual or group violating section 5104(e)(1) of this title, or attempting to commit a violation, shall be fined under title 18, imprisoned for not more than five years, or both.

(b) Other offenses.--A person violating section 5103 or 5104(b), (c), (d), (e)(2), or (f) of this title, or attempting to commit a violation, shall be fined under title 18, imprisoned for not more than six months, or both.

(c) Procedure.--

(1) In general.--An action for a violation of this chapter or section 9, 9A, 9B, 9C or 14 of the Act of July 31, 1946 (ch. 707, 60 Stat. 719, 720), including an attempt or a conspiracy to commit a violation, shall be brought by the Attorney General in the name of the United States. This chapter and sections 9, 9A, 9B, 9C and 14 do not supersede any provision of federal law or the laws of the District of Columbia. Where the conduct violating this chapter or section 9, 9A, 9B, 9C or 14 also violates federal law or the

laws of the District of Columbia, both violations may be joined in a single action.

(2) Venue.--An action under this section for a violation of–

(A) section 5104(e)(1) of this title or for conduct that constitutes a felony under federal law or the laws of the District of Columbia shall be brought in the United States District Court for the District of Columbia; and

(B) any other section referred to in subsection (a) may be brought in the Superior Court of the District of Columbia.

(3) Amount of penalty.–The penalty which may be imposed on a person convicted in an action under this subsection is the highest penalty authorized by any of the laws the defendant is convicted of violating.